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Issue date: 23Apr2002

CASE NO.: 2001-AIR-5

In the Matter of

GEORGE T. DAVIS, Jr. and DIANE DAVIS,
Complainants

v.

UNITED AIRLINES, INC.
Respondent

RULING AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION ON DIANE DAVIS'S CLAIM

FACTUAL AND PROCEDURAL HISTORY

This matter involves a dispute concerning alleged violations by the Respondent-employer, United Airlines, Inc., ("United") of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR Act), 42 U.S.C. § 42121, (the "Act").

On February 13, 2001, Complainants, George T. Davis and his wife, Diane Davis, filed their complaint against United, alleging that they both were disciplined in violation of the whistleblower protection provisions of the AIR Act. More specifically, George T. Davis, a mechanic for United, alleged that he was suspended without pay and later terminated after reporting two alleged safety violations to pilots of United, which regarded a hydraulic leak on September 29, 2000 and a defective tire on November 15, 2000.

In addition, Diane Davis, an employee in United's cabin services, alleged that United retaliated against her as a result of her husband's conduct. In support of her complaint against United, Mrs. Davis alleges that, beginning in December of 2000, she was formally disciplined for her conduct, while her co-workers were given written warnings for the same activities. More specifically, Mrs. Davis stated, that on April 15, 2001, she received a letter ("Safety Letter") from Edward Hubbard, her team leader, claiming that Mrs. Davis' safety record was unacceptable as a result of the injuries she received on the job on March 31, 2001 and April 27, 2000. Thereafter, on April 23, 2001, Mrs. Davis was given a Level 1 discipline by Scott Patterson for missing work fourteen times on five occasions from December 19, 1999 through December 19, 2000. Mrs. Davis maintains that other UAL employees were given verbal and/or no discipline for similar absences. Mrs. Davis further alleged that on or about March 15, 2001, she returned to work after being ill, however, she was sent home from work by Scott Patterson, her supervisor, because her

security badge had expired on March 11, 2001. Mrs. Davis contends that, on several occasions, other employees were permitted to work with expired security badges. Moreover, Mrs. Davis alleges that she was harassed by her supervisor for her inadequate job performance, despite having a smaller crew than most shifts.

UAL's Contentions

Despite Mrs. Davis' allegations, on April 10, 2002, United filed a Motion for Summary Decision on Diane Davis' claim. United asserts that Mrs. Davis is not entitled to protection under the AIR Act, because the Act provides no protection for air carrier employees who have not reported an alleged safety violation. United further adds that the Act does not extend protection to spouses of air carrier employees, who have reported alleged safety violations to the FAA or the air carrier.

Additionally, United contends that at the time of Mrs. Davis' discipline, her supervisors, did not know about United's action against Mr. Davis, and therefore, there is no evidence establishing that Mrs. Davis was retaliated against for her husband's conduct. To the contrary, United maintains that Mrs. Davis' Level 1 discipline, given on April 23, 2001, was the sole result of her unacceptable number of absences from work in violation of United's Rules of Conduct regarding dependability. United adds that Mrs. Davis' supervisor, Scott Patterson, who signed off on the Level 1 discipline, had no knowledge of the Mr. Davis' alleged whistleblowing activities. Moreover, United asserts that the letter received by Mrs. Davis on April 15, 2001, regarding her safety record, was not disciplinary in nature, since it will be removed from her file after two accident free years on the job. United further contends that the letter was not issued in retaliation for Mr. Davis' conduct. Accordingly, United concludes that it is entitled to summary decision on her claim.

Complainant's Contentions

On April 20, 2002, Complainants filed a Response to United's Motion for Summary Decision on Diane Davis' Claim. In addition, Complainants filed a Cross Motion for Summary Decision. [1] Complainants maintain that the Whistleblower protection provisions of the AIR Act extend protection to spouses of employees, even where such spouse did not engage in protected activity. Additionally, Complainants argue that Sue Horn, one of Mrs. Davis' supervisors, had knowledge of Mr. Davis' alleged whistleblowing activities. Furthermore, Mrs. Davis asserts that the decision to issue her Level 1 discipline was not made by her direct supervisor, Scott Patterson, but rather the decision was made by United's "Wellness Group" managers. Complainants contend that the fact that Mrs. Davis' Level 1 discipline, regarding her dependability, was issued more than five months after the time frame of the alleged Rule violation, establishes that the subject discipline was the made in retaliation for Mr. Davis' whistleblowing conduct. Accordingly,

[1] Complainants Cross Motion for Summary Decision with Respect to Diane Davis' claim, will be addressed in a separate decision.

Complainants conclude that United's Motion for Summary Decision should be denied.

LAW

a. *Standard of Law - Summary Judgment*

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. 29 C.F.R. §18.40, *see also* Federal Rule of Civil Procedure 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U. S. 317, 323-34 (1986).

If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of her pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988).

b. *Entitlement under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 29 C.F.R. Part 179, 49 U.S.C. § 40101 et. seq.*

The AIR Act states that it is a violation for any air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner **discriminate against any employee because the employee**: 1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) to the air carrier or the Federal government information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal Law; 2)

filed, caused to be filed, or is about to file (with any knowledge of the employer) a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the FAA or

any other provision of Federal Law; 3) testified or is about to testify in such a proceeding; or 4) assisted or participated or is about to assist or participate in such a proceeding. 29 C.F.R. § 1979.102. [2]

In order to establish a prima facie case under the AIR Act the complainant must show:

1) The employee engaged in a protected activity or conduct;
2) The named person knew, actually or constructively, that the employee engaged in the protected activity;
3) The employee suffered an unfavorable personnel action; and
4) The circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

29 C.F.R.§ 1979.104(b)(1). In regard to the interpretation of the "contributing factor" requirement, in *Taylor v. Express One International*, 2001-AIR-2 (Feb. 2002), the administrative law judge adopted the definition in *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1):

> The words "contributing factor"...mean any factor, which alone or in connection with the other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule the existing caselaw, which requires a whistleblower to prove that his protected activity was a "significant", "motivating", "substantial", or "predominant" factor in a personnel action in order to overturn that action.

Once the complainant establishes his or her prima facie case, the burden shifts to the respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct. 29 C.F.R. §1979.104(c).

If the respondent meets its burden to produce legitimate, non-discriminatory, reasons for its employment decision, the inference of discrimination is rebutted, and the complainant must then assume the burden of proving by a preponderance of the evidence that respondent's proffered reasons are "incredible and constitute a pretext for discrimination." *Taylor v. Express One International*, 2001-AIR-2 (Feb. 2002), slip op. at 37, quoting *Overall v. Tennessee Valley Authority*, Case No. 1997-ERA-53, at 13 (ARB Apr. 2001).

FINDINGS OF FACT AND LAW

[2] The AIR Act defines "employee" as an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier. 29 C.F.R. § 1979.101.

A. *Complainant, Diane Davis, has failed to establish that she has standing to assert a claim under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 29 C.F.R. Part 179, 49 U.S.C. § 40101 et. seq.*

Despite the factual and legal assertions of Mrs. Davis, I find, as a matter of law, that Mrs. Davis does not have standing to assert an individual claim under the AIR Act. In the present claim, there is no evidence that Mrs. Davis engaged in any statutorily protected activity. Moreover, I find that the plain language of the AIR Act does not expand its protection to spouses of whistleblowers, where the spouse did not personally engage in a protected activity. The AIR Act expressly states that "it is a violation for any air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee engaged" in a protected activity enumerated in 29 C.F.R. § 1979.102 *supra* (emphasis added).

While the Complainants argue that the AIR Act extends protection to spouses of whistleblowers, I find their argument is less than compelling. First, the Complainants provided no authority, by way of legislative history, that Congress intended the AIR Act to extend derivative protection to spouses, who had not themselves engaged in statutorily protected activity. Second, the Complainants did not cite a single whistleblower statute, other than the Fair Labor Standards Act (not a traditional whistleblower statute), where "derivative" protection has been afforded to spouses of employees who engaged in protected activity. Neither the Act nor any legislative history of which I am aware even suggests that employee's spouses have derivative protection.

Third, the only legal authority cited by the Complainants in support of their assertion that Mrs. Davis has standing under the AIR Act, was *Marshall v. Georgia Southwestern College,* 489 F.Supp.1322 (M.D. Ga. 1980), *aff'd in part, remanded in part*, *Secretary of Labor*, *Brock* v. *Georgia Southwestern College* 765 F.2d 1026 (11th Cir. 1985)*[McKinney]*. In *Marshall*, the plaintiffs asserted that Dr. Max McKinney was asked to resign as chairperson in the math department in retaliation for his wife's complaints regarding unequal pay under the Equal Pay Act. 29 U.S.C. §§ 201 et. seq. The Middle District Court of Georgia found that the anti-retaliation provision of the Fair Labor Standards Act 29 U.S.C. § 215(a)(3) [3], extended protection to spouses of employees who engaged in protected activity. [4] The Court reasoned that to deny protection to the spouse would subvert the purpose of the Act. However, the Court did not cite any legislative history or case law in support of its expansive interpretation of the Fair Labor Standards Act. Furthermore, on appeal, the Eleventh Circuit Court of Appeals did not explicitly address the propriety of applying § 215(a)(3) "derivatively" to spouses.

Absent interpretation of similar whistleblower statutes or on-point decisions from the

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[3] This provision, 29 U.S.C. §§ 201 *et. seq*., is commonly referred to as the Equal Pay Act.

[4] 29 U.S.C. § 215(a)(3), provides, in part, that it is unlawful to discriminate against "any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or rleated to this chapter, or testified or is about testify in any such proceeding."

Tenth Circuit, I looked to the judicial interpretations of provisions contained in other statutes containing anti-retaliation provisions, as persuasive authority. [5] Although the Complainants noted that the Eleventh Circuit extended protection to spouses under the anti-retaliation provision of the Equal Pay Act, several other circuit courts have declined to extend such protection to spouses. In *Holt v. JTM Industries*, 89 F.2d 1224, (5th Cir. C.A. 1996), *cert. denied,* 520 U. S. 1229, 117 S.Ct. 1821, 137, L.Ed 2d 1029 (1997), the Fifth Circuit Court of Appeals held that a husband, who had not engaged in protected conduct, lacked standing to sue for retaliation under the Age Discrimination in Employment Act ("ADEA"). The Court in *Holt* held that the plain meaning of § 623(d) of the ADEA does not extend automatic standing to spouses to sue for retaliation simply because his or her spouse engaged in protected activity. *Holt* at 1226-27. [6] While the Court recognized the possible risk that an employer will discriminate against a complaining employee's relative or spouse, the court cautioned that extending protection to spouses, then raises questions regarding the standing of other relatives and friends. *Holt* at 1227.

Additionally, in *Smith v. Riceland Foods Inc*., 151 F.3d 813 (8th Cir. 1998), the Eighth Circuit Court of Appeals held that, under Title VII, a plaintiff does not have standing to claim retaliation when he or she suffers adverse employment action because of the protected activity of his or her spouse. The Court, in *Smith,* concluded that the plain meaning of Title VII, requires that a plaintiff bringing a retaliation claim must establish that he or she personally engaged in protected conduct. *Smith* at 819. *See also, Fogleman v. Mercy Hospital, Inc*., 283 F.3d 561, 568-570 (3d Cir. 2002) (ADEA).

The plain language of the AIR Act requires that an employee or "person acting pursuant to a request of the employee" engage in a protected activity, as set forth in 29 C.F.R. §1979.102, in order to have standing to bring a retaliation claim. When a statute's plain meaning is clear, it should be

enforced as written. *Caminetti v. United States*, 242 U.S. 470 (1917); *In Re Pelkowski*, 990 F.2d 737, 741 (3d Cir. 1993). Accordingly, I find that the plain language and meaning of the Act precludes giving derivative protection to spouses of whistleblowers based solely upon their status as a spouse.[7]

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[5] In addition, I examined cases under the Energy Reorganization Act ("ERA"). The decisional law developed under the whistleblower protective provisions of the ERA, as amended in 1992, has been cited as providing the framework for litigation under the AIR Act. *Taylor v. Express One International, Inc*., 2001-AIR2, slip op. at 34. (ALJ Feb. 15, 2002). The ERA has not extended derivative protection to spouses of whistleblowers.

[6] Secion 623(d) of the ADEA prohibits an employer from retaliating against an employee because "such individual" has opposed a practice prohibited by the ADEA or has participated "in any manner" in a proceeding under the ADEA.

[7] I recognize that situations may arise where a spouse, or a third party, may have standing when they themselves engage in a protected activity, by "acting pursuant to a request of the employee".

I find that there is no evidence that Mrs. Davis, at any time, engaged in a protected activity enumerated inn 29 C.F.R. § 1979.102. In addition, I find that there is no indication that, under the AIR Act, Congress intended to extend protection, to employees whose spouses engaged in statutorily protected activity. I accordingly find that Mrs. Davis has no standing, under the AIR Act, to pursue the present claim against United. I conclude that there is no genuine issue of fact, and United is entitled to Summary Decision, as a matter of law.

B. *Assuming arguendo that Mrs. Davis has derivative standing to pursue her claim against United, Mrs. Davis has failed to establish that there is a genuine issue as to a material fact for trial, as required by 29 C.F.R. § 18.40.*

Even assuming that the AIR Act extended protection to Mrs. Davis, as a spouse of a whistleblower, Mrs. Davis has failed to establish that there is a genuine issue of material fact as to whether her supervisors had knowledge of Mr. Davis' alleged whistleblowing conduct at the time of her April 23, 2001 discipline or that Mr. Davis' alleged protected activities were contributing factors in United's decision to discipline her.

Accordingly, Mrs. Davis has failed to establish a *prima facie* case under the AIR Act. Mrs. Davis allegations that her supervisors retaliated against her in response to her husband's conduct are based only upon speculation and suspicion. Moreover, Mrs. Davis has failed to identify any specific facts showing that there is a genuine issue of material facts.

Indeed, the only evidence produced by Mrs. Davis in her support of her of Response to United's Motion for Summary Decision was Scott Patterson's deposition transcript and Mrs. Davis' own affidavit. While Mr. Patterson testified during his deposition that United's "Wellness Group" actually made the decision to discipline Mrs. Davis on April 23, 2001 for her number of absences, at no time did Mr. Patterson state that the Wellness Group had any knowledge of Mr. Davis' alleged whistleblowing conduct. (Patterson Dep. at 9-10). Moreover, there is no evidence of record that the

"Wellness Group" knew or should have known of Mr. Davis' alleged whistleblowing conduct. Furthermore, according to Complainants' Pre-Hearing Submission, no one from United's "Wellness Group" is scheduled to testify at the hearing. [8]

[8] I will, for purposes of the record, permit counsel for Complainant, Diane Davis, to make an offer of proof at the hearing, as to what, if any, knowledge, the "Wellness Group" had regarding Mr. Davis' alleged whistleblowing conduct, when the Group issued the April 23, 2001 Level 1 discipline to Mrs. Davis.

Mrs. Davis' affidavit similarly fails to produce a genuine of material fact. In her affidavit, Mrs. Davis merely alleges that her supervisor, Sue Horn, knew about Mr. Davis getting "walked off", because she saw a television clip regarding Mr. Davis in the break room when Mrs. Davis was present. However, there is no evidence of record corroborating the accuracy of this allegation. In addition, Mrs. Davis alleges that the "Wellness Group", not Sue Horn, made the decision to discipline her. Moreover, Mrs. Davis concludes her affidavit by stating that "she has no direct knowledge regarding whether the 'Wellness Group' supervisors knew about my husband's whistleblower action when United decided to discipline me..." Mr. Patterson's deposition testimony establishes that such a disciplinary action would not be unusual for one with the number of absences Mrs. Davis had within a given time frame. Accordingly, I find that Mrs. Davis has failed to present any specific facts establishing that a genuine issue of material fact remains and has only relied upon her own speculation and suspicions in support of her claim.

It is well settled that the non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). In addition, the non-moving party cannot rest upon the mere allegation or denials of his or her own pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Much v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). Accordingly, since Mrs. Davis has failed to set forth specific facts showing that there is a genuine issue for trial, I find that United is properly entitled to Summary Decision.

CONCLUSION

I find that, Respondent, United, is entitled to Summary Decision in the present claim for the following reasons: one, the AIR Act does not extend derivative protection to spouses of whistleblowers, therefore Mrs. Davis has no standing to assert the present claim against United; and, two, even if Mrs. Davis had standing under the AIR Act to assert the present claim against United, Mrs. Davis has failed to establish that there is a genuine issue of material fact as to whether her supervisors had knowledge of Mr. Davis' alleged whistleblowing conduct at the time of Mrs. Davis' April 23, 2001 discipline.

RULING AND ORDER

Respondent's Motion for Summary Decision, pursuant to 29 C.F.R. § 18.40, is **GRANTED** and Complainant, Diane Davis's claim is hereby **DISMISSED.**

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RICHARD A. MORGAN
Administrative Law Judge

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